NO. 82-1276

In the Supreme Court of the United States

OCTOBER TERM, 1982

DIAMOND M DRILLING CORPORATION
Petitioner

VERSUS

DAVID R. TARLTON AND
EXXON CORPORATION
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

Pursuant to Supreme Court rules 21(b) and 28.1, counsel for respondent certifies that the following are the only parties to this proceeding, to-wit:

David R. Tarlton
Exxon Corporation
Golden Meadow Enterprises, Inc.
Eserman Offshore Services
Coastal Boat Operators, Inc.

Respondent, David R. Tarlton, is an individual and no other persons have an interest in the claims asserted by him.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 688 F.2d 973 (5th Cir. 1982) and is contained in full at appendix A-1 of petitioner's brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

FEDERAL RULES OF CIVIL AND APPELLATE PROCEDURE

Rule 59 of the Federal Rules cited in the within

opposition is set forth in full in petitioner's brief at page 2 and in respondent Exxon's brief at appendix A-3.

STATEMENT OF THE CASE

The Statement of the Case contained in the brief of respondent Exxon at page 2 is adopted herein.

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the writ should be denied for the following reasons:

(1) Petitioner failed to timely file post-trial motions under 59(b) of the Federal Rules and relinguished its right to post-trial relief after the elapse of ten days from entry of Judgment.

(2) The Court of Appeals for the Fifth Circuit based its opinion solely and only on the facts in the record, and did not take Judicial Notice of a fact not in the record.

(3) A single statement by the trial Judge in his Charge to the Jury to the effect that it could consider inflation is not erroneous.

POST-JUDGMENT RELIEF AT THE TRIAL LEVEL

Petitioner, Diamond M Drilling Corporation, was cast in Judgment in the District Court in this case and chose not to file a Motion for a new trial under 59(b) of the Federal Rules of Civil Procedure.

His Honor in the District Court granted a *sua sponte* new trial, conditioned upon respondent's acceptance of a

remittitur, more than ten days after he entered Judgment on all claims asserted by all parties in derogation of the specific language of 59(d) of the Federal Rules of Civil Procedure.

The United States Court of Appeals for the Fifth Circuit correctly vacated the District Court's untimely granting of a *sua sponte* new trial under 59(d) of the Federal Rules of Civil Procedure and reinstated the amount remitted by the District Court.

Petitioner urges this Court to give a contorted interpretation to Rule 59, which, if accepted, will bring uncertainty to a limitation period sought to be made certain by the passage of Rule 59 of the Federal Rules.

Petitioner cites as authority the decision of the United States Court of Appeals in *Cornist vs. Richland Parish School Board*, 479 F.2d 37 (1973). A cursory reading of the *Cornist* opinion will disclose that the Court in that case was presented with a factual situation involving an amended or second judgment referred to by petitioner in its brief as a superceding judgment.

There was no amended, second, or superceding judgment in this case.

The District Court entered judgment in accordance with the jury verdict on March 27, 1980. The only action taken subsequent to that was the District Court's granting of the *sua sponte* new trial in favor of petitioner on June 3, 1980, more than ten days after the judgment. Petitioner argues that the *sua sponte* action of the Court, since it altered the original judgment, constitutes an amended, second, or superceding judgment. If that argument is

accepted then every party litigant will have ten days from any alteration in a judgment by *sua sporte* action by the trial Judge, or post-trial motion, within which to file a motion for a new trial, instead of ten days from entry of judgment.

It is respectfully submitted that the judgment of the United States Court of Appeals for the Fifth Circuit on this issue is obviously in keeping with the intent and purpose of Rule 59 of the Federal Rules and that petitioner's suggested interpretation would result in procedural chaos and, accordingly, should be rejected.

JUDICIAL NOTICE AT THE APPELLATE LEVEL

Petitioner erroneously suggests that the United States Fifth Circuit Court of Appeals improperly took judicial notice of a "fact" established to the contrary in the record of the case.

Petitioner makes the foregoing conclusion by suggesting that the Court's citation of its decision in *Hebron vs. Union Oil Co. of Calif.*, 634 F.2d 245 (5th Cir. 1981), fails to recognize the critical factual difference between the cited case and the instant case, the former involving stable cargo and the latter involving unstable cargo. A careful reading of the decision of the Fifth Circuit Court of Appeals will clearly show that petitioner's contention is without merit.

The Fifth Circuit Court of Appeals cited *Hebron, supra*, as authority for the proposition that it was not negligent for Exxon Corporation to dispatch a vessel to offload or on-load cargo from an offshore platform in six foot to eight foot seas.

Liability was not visited upon Diamond M by the jury, or by the United States Court of Appeals for the Fifth Circuit, because the seas were rough. Liability was visited upon Diamond M because its crane operator, without warning to Captain Tarlton, attempted to "sneak" drill pipe aboard his vessel in rough seas, thereby depriving Captain Tarlton of his right, as captain of the vessel, to reject the cargo, or make proper preparation for the safe reception and storing thereof. The Fifth Circuit Court of Appeals made the following pertinent observation at page 6 of its opinion, to-wit:

> "Our review of the testimony convinces us beyond peradventure that the cause of the accident was the decision by the Diamond M crane operator to 'sneak' the drill collar on board the BECT I. The crane operator admitted he had to act stealthily because he believed Captain Tarlton would not have allowed him to load the tubular drill collars on the vessel..."

It is respectfully submitted that the United States Fifth Circuit Court of Appeals did not take judicial notice of a fact not in the record of this case.

INFLATION

The District Judge in this case requested counsel for respondent not to introduce evidence of inflation, or argue inflation, during the trial of the case because of the uncertainty of the developing appellate jurisprudence on that issue. His Honor below made the aforesaid request for the stated purpose of avoiding an appeal of the case on that issue. Counsel for respondent complied with the request of His Honor below and the record is devoid of any testimony concerning inflation, or any argument of counsel relating

to inflation.

The single reference to inflation in the four day trial of this case was the following one sentence statement of His Honor below to the jury in his lengthy charge, to-wit:

> "You may also take into consideration the decreased purchasing power of the dollar, or what is commonly called inflation".

This case does not fall into the category of "inflation" cases cited by petitioner. Those cases involve those issues that respondent relinquished, at the request of His Honor in the District Court, in order to avoid an appeal.

The question presented here is not what evidence is pertinent to the projection of future lost wages, but whether a single reference, in on sentence, in a charge to a jury in a four day trial is reversible error.

This Court, and the federal appellate courts throughout this country, have frequently stated that it is improper to isolate a single sentence, or phrase, in a jury charge in order to make a determination of the presence, or absence, of prejudicial error.

In *Borel vs. Fiberboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), the Court stated the applicable rule as follows:

> "In reviewing all trial court instructions to a jury in a trial such as this we follow as a standard test: we consider the challenged instruction as part of the entire charge, in view of the allegations of the complaint, the evidence presented, and the argu-

> ment of counsel, to determine whether the jury was mislead and whether the jury understood the issues..."

It is inconceivable that the jury, assuming that a single reference to inflation is improper, focused on that one statement of His Honor in the District Court and utilized that as its bases for rendition of a prejudicial verdict.

It is respectfully submitted that this case does not present the inflation issues presented in the cases cited by petitioner.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari filed by Diamond M Drilling Corporation should be denied at its costs.

WIEDEMANN & FRANSEN

BY: _____

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CERTIFICATE

I hereby certify that a copy of the foregoing Opposition has been served upon counsel for all parties by placing same in the United States Mails, postage pre-paid, properly addressed.

New Orleans, Louisiana, this ____ day of April, 1982.

LAWRENCE D. WIEDEMANN